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No. 97-

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

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ARTHUR W. STIGILE AND ELLEN BALIS,

*Petitioners,*

v.

WILLIAM J. CLINTON, PRESIDENT, *et al.*,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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95 pp

## QUESTIONS PRESENTED

1. Whether staff employees of the Office of Management and Budget ("OMB") may constitutionally be subjected to random drug testing solely because they hold passes to the Old Executive Office Building ("OEOB"), on the theory that such testing is necessary to protect the physical security of the President and the Vice President, when

(a) hundreds of interns, volunteers, and government contractors also have OEOB passes and are not subjected to drug testing;

(b) OMB employees are subject to stringent full field FBI background investigations, while others with OEOB passes are not;

(c) OMB employees must pass through the same Secret Service security checkpoints (with x-ray and magnetometer screening) as all other persons who enter the OEOB;

(d) there is no evidence of any drug problem among OMB employees; and

(e) The President and Vice President are always protected by Secret Service agents when they are in the OEOB.

2. Whether *Chandler v. Miller,* 117 S.Ct. 1295 (1997) requires reversal of the court of appeals' decision because the decision allows random drug testing based on hypothetical threats of harm.

## LIST OF PARTIES

Plaintiffs below and petitioners here are Arthur W. Stigile and Ellen Balis, employees of the Office of Management and Budget.

Respondents are William J. Clinton, President of the United States, in his official capacity, and John B. Arthur, Associate Director for Administration, Office of Management and Budget, in his official capacity.

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## OPINIONS BELOW

The opinion of the court of appeals for the District of Columbia Circuit is reported at 110 F.3d 801 (D.C. Cir. 1997) and is reprinted in the Appendix at A-1 to A-19. That court's orders denying rehearing and rehearing *en banc* are reprinted in the Appendix at A-27, A-28. The dissenting opinion from the denial of rehearing *en banc* is reprinted in the Appendix at A-30.

The Memorandum Opinion of the district court is reported at 932 F. Supp. 365 (D.D.C. 1996) and is reprinted in the Appendix at A-20 to A-25.

## JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 15, 1997. The court of appeals denied a petition for rehearing and suggestion for rehearing en banc on August 21, 1997. This court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1) because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the District of Columbia Circuit.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), and the Executive Office of the President Drug-Free Workplace Plan. The Executive Order is set out *verbatim* in the Appendix.

## I. STATEMENT OF THE CASE

### A. SUMMARY OF THE FACTS

#### *1. Petitioners*

Petitioners Arthur Stigile and Ellen Balis are well-regarded employees of the Office of Management and Budget who have received numerous performance awards over the course of their employment as career budget analysts with the OMB. These two employees are not involved in drug interdiction, do not have access to classified or sensitive information, do not carry firearms, and are not engaged in safety sensitive occupations. Their offices are in the New Executive Office Building ("NEOB"), which is one block away from the OEOB on Seventeenth Street, N.W. They both visit the OEOB, which is immediately west of the White House and within the White House security perimeter, on an infrequent and irregular basis, primarily to attend meetings on budget-related matters with top OMB officers, who have offices in the OEOB. Both petitioners have worked for the OMB for over ten years, have undergone full field background investigations by the FBI, have been untested for drug usage, and at no time have they or their colleagues ever been considered a threat to the safety or security of the President or Vice President.

#### *2. The EOP Plan*

The drug testing program in question is conducted pursuant to Executive Order No. 12,564, which authorizes the head of every federal agency to institute random or otherwise uniform testing of all employees in "sensitive positions." Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986) (A-33, A-37). Pursuant to this authority, in 1988, the Executive Office of the President ("EOP") promulgated its Drug-Free Workplace Plan, which authorizes mandatory

testing of all applicants in sensitive positions and "random testing" of all employees in testing designated positions. Almost seven years after the EOP Plan was instituted, petitioners were notified that their positions had been designated for random urinalysis testing. The sole basis for adding petitioners to the random drug testing pool is their possession of permanent OEOB passes. Petitioners offered to return their OEOB passes and thereby eliminate the EOP's basis for including them in the random drug testing pool. The EOP refused plaintiffs' offer to return their OEOB passes.

### *3. The OEOB Pass and Access System*

Approximately 7,000 people have passes which permit them access to the White House complex, which includes the White House, the Old Executive Office Building and the New Executive Office Building. These pass holders include, *inter alia*, interns, volunteers and employees of government contractors. *See* General Accounting Office, Personnel Security - Pass and Security Clearance Data for the Executive Office of the President, GAO Report No. GAO/NSIAD-96-20 (Oct. 19, 1995). The passes are issued by the EOP. However, the Secret Service controls entry to the OEOB, has primary responsibility for the safety of the President and Vice President, and does not require any persons, either pass holders or non-pass holders, to show proof of eligibility for random urinalysis testing to gain regular access to the OEOB. *See id.* at 12 n.3, 22.

OEOB passes were issued to the petitioners, and other OMB employees, solely as a matter of administrative convenience, and do not grant these pass holders greater access to the OEOB than non-pass holders. Entry into the OEOB is granted to OEOB pass holders and non-OEOB pass holders in almost identical fashion; the major

difference is that OEOB pass holders generally do not have to wait in line for access. Both groups pass through the same on-site clearance procedures whenever they are admitted to the OEOB, *i.e.*, they show photo identification (or pass) and are required to clear magnetometer and x-ray security screening measures. Once the OEOB pass holder, or non-OEOB pass holder, enters the OEOB, that person can go unaccompanied anywhere in the building, except those areas which are secured -- which *neither* group can enter. A permanent OEOB pass holder can invite non-pass holders to enter the OEOB; however, guests of OEOB pass holders must pass through the same on-site security clearance procedures as all other non-OEOB pass holders.

At a minimum, approximately 600 interns, and numerous volunteers, federal employees with appointments, government contractors, and private sector maintenance personnel, have non-permanent OEOB passes (volunteer, intern, and temporary) that allow them access to the same areas of the OEOB as permanent OEOB pass holders. *See Stigile v. Clinton,* 932 F. Supp. at 366. (A-23). These non-permanent pass holders are not required to submit to random urinalysis tests as a requisite to obtaining an OEOB pass. In addition, non-permanent pass holders are not subject to the full field FBI background investigations that permanent pass holders undergo.

## B. SUMMARY OF PROCEEDINGS BELOW

On June 12, 1996, Mr. Stigile was notified that he had been randomly selected for drug testing under the EOP Plan. On that same day, petitioners filed their Complaint with the district court asserting that the drug testing program violated the Fourth Amendment. Petitioners filed a motion for a temporary restraining order ("TRO") to prohibit defendants from subjecting Mr. Stigile to random drug testing on that day. The government opposed the

TRO and asserted that suspicionless testing of OEOB passholders is necessary to ensure the safety of the President and Vice President. The district court granted the TRO stating:

> You go in that Executive Office Building and in addition to hanging that emblem around your neck, and go through a lot of metal detectors and I just don't see it. . . . [I]t would appear to me that this case is really a stopping point. You don't have top secret information, you don't have sensitive information and you don't have anybody who is running around the President, who might bump into him in the hall or bump into him in his office, you don't have that.
>
> * * *
>
> I know the President isn't walking up and down the hallway without secret service agents in there.

Trans. at 48-49.

Thereafter, on June 19, 1996, petitioners filed a motion for a preliminary injunction. On July 10, 1996, the district court held a combined hearing on petitioners' motion for a preliminary injunction and the merits of their

Complaint.[1] The government presented no evidence that there is a drug abuse problem among OEOB pass holders. *Stigile v. Clinton*, 932 F.Supp. 365, 366 (D.D.C. 1996) (A-22) . The district court found that numerous individuals (including approximately 600 interns) who are not subject to drug testing are permitted access to the same areas of the OEOB as petitioners on a daily basis. *Id.*

In addition, the district court found that the President and Vice President are accompanied by Secret Service agents whenever they visit the OEOB, that access to the Vice President's office in the OEOB is restricted, and the entrance thereto is guarded by Secret Service. *Id.* (A-23) Finally, the district court found that *all* entrants to the OEOB, regardless of pass holder status, must pass through the same physical security measures. *Id.* Based on the evidence presented, the district court found that the governmental interest in protecting the President and Vice President was not a credible basis to justify testing petitioners:

> There is *no* evidence that the plaintiffs or their guests have access to "sensitive" information or that they have unique or special access to the President or Vice

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[1] Petitioners objected to the consolidation of their motion for preliminary injunction with the merits of the case because they had only a few weeks for discovery and asserted that relevant facts regarding access to the OEOB and the level of protection supplied to the President and Vice President in the OEOB remained unknown, or were in dispute. Petitioners raised this objection again in the Court of Appeals, but it was not addressed. Petitioners assert that the District Court's consolidation ruling was in error and, at a minimum, the case should be remanded to the District Court for further fact finding.

> President such that the plaintiffs or their guests pose a physical threat to the President or Vice President. Accordingly, since the government does not have a legitimate interest in drug testing the plaintiffs, the government has no interest to tip the Constitutional scales in favor of drug testing as applied to the particular facts of this case.

932 F. Supp. at 368 (A-25) (emphasis added). In accordance with these findings, the district court enjoined the defendants from subjecting petitioners to random drug testing under the EOP Plan on the grounds that the drug testing violates the Fourth Amendment.

A three-judge panel of the court of appeals for the District of Columbia Circuit reversed the judgment of the district court. The court of appeals established an unprecedented presumption that in cases involving "an extremely serious harm," the court "should hold for the government so long as there is an adequate connection between the harm sought to be avoided and the drug testing program." *Stigile v. Clinton,* 110 F.3d at 806 (A-11). The connection which the court found in this case was that: (1) "a drug user could be vulnerable to bribery or intimidation" and (2) "a drug-using OEOB pass holder could be blackmailed into using his access to the building to assist in an attack on the President." *Id.*

Petitioners thereafter filed a Petition for a Rehearing and Suggestion for a Rehearing en banc. The grounds for rehearing included the fact that this court's decision in *Chandler v. Miller*, 117 S.Ct. 1295 (1997), was issued on the same day as the appellate court's decision, and therefore the court had issued its decision without benefit of this court's directly relevant decision. The court of appeals required the government to respond to the petition, but then denied the Petition on August 21, 1997, over a dissent from

Circuit Judge Wald. Judge Wald found that the panel's decision permitting random drug testing of petitioners did not comport with this court's decision in *Chandler*:

> I would grant rehearing in banc because I do not believe that the grounds upon which the panel justified random drug testing for all employees of the Old Executive Office Building comport with the more stringent criteria laid down by the Supreme Court in its recent *Chandler v. Miller* decision. See *Chandler v. Miller*, 117 S.Ct. 1295 (1997). There is no history here of any threat to the safety of the President or Vice-President from government employees holding permanent passes to the Old Executive Office Building; indeed, the rules provide for rather lenient access by unscreened visitors to this same area. Presumably, the backgrounds of EOB employees have been checked at the time they were hired, their behavior can be routinely supervised and the "special" justification here -- that the President and Vice-President should be allowed to move about free from the threats posed by drug abusers -- applies throughout the government, and even to areas where these officials are scheduled to make public appearances. This decision simply cuts too wide a swath through employees' liberty interests, and should be reheard.

A-30.

## II. SUMMARY OF ARGUMENT

The ruling of the court of appeals, permitting random drug testing of government employees based on an

attenuated chain of hypothetical concerns about the safety of the President and Vice President, massively expands the narrow exceptions that this court has recognized to the Fourth Amendment's general requirement of probable cause.

To uphold the testing at issue, the court of appeals accepted the government's unsupported speculation that, absent random drug testing, OMB employees would (a) use illegal drugs, (b) have contact with persons wishing to harm the President or the Vice President who knew of their illegal drug use, (c) be blackmailed or intimidated into attempting to harm, or assisting others in attempting to harm, the President or Vice President, and (d) succeed in harming the President or the Vice President despite the Secret Service is on-site physical security precautions at the OEOB, which include x-ray and magnetometer screening of all persons entering the OEOB, and the security details that accompany the President and the Vice President at all times. In reaching its conclusion, the court of appeals viewed as irrelevant the fact that OMB employees are required to pass full field FBI background investigations, while hundreds of interns, volunteers, employees of government contractors and journalists who have not been subjected to full field FBI background investigations, but have non-permanent OEOB passes, are not subject to random drug testing.

The decision below is inconsistent with the court's recent decision in *Chandler*, which held that suspicionless drug testing must be based upon real, not imaginary or symbolic, dangers to important governmental interests.

The decision below is also inconsistent with the long-standing requirement, embodied both in the Executive Order authorizing federal drug-testing programs, and in the decisions of this court, that suspicionless drug testing based upon a person's employment is not reasonable under the

Fourth Amendment unless there is a nexus between the employee's job responsibilities and the feared harm from drug use. *See Skinner*, 489 U.S. at 618-21; *Von Raab*, 489 U.S. at 668-71. Instead, the court of appeals substituted an illusory nexus requirement that simply requires a connection between drug use and the feared harm. Almost any feared harm can be hypothesized to arise from drug use, and thus the court's "nexus" requirement has no real value.

Taken to its logical end, the decision below would permit random drug testing of virtually any federal employee in the Washington area, since almost any such employee may have access to buildings frequented by members of the Cabinet, Members of Congress, or Justices of this court, whose safety are also important government interests (and who are not surrounded by Secret Service bodyguards). Indeed, the court's rationale would appear to permit random drug testing of any government employee who drives to work, since a drug-impaired driver may cause an accident that takes the life of an innocent individual, and the protection of life is also an important government interest.

Finally, the court of appeals failed to undertake the required balancing of the value of randomly testing *these* employees in furthering the government's interest in protecting the safety of the President and the Vice President against the intrusion on petitioners' constitutional rights. That balancing would not have sustained the random testing at issue.

## III. REASONS FOR GRANTING THE WRIT

In a trilogy of cases, *Skinner, Von Raab,* and *Chandler,* this court has set forth the application of the Fourth Amendment protection in cases involving mandatory suspicionless drug testing. *Chandler v. Miller,*

117 S.Ct. 1295 (1997); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Under these cases, it is well-settled that random urinalysis testing is a search under the Fourth Amendment. *Skinner*, 489 U.S. at 617; *Von Raab*, 489 at 665. Whether a proposed search is reasonable "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner*, 489 U.S. at 619, *citing United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985).

While a warrant based upon probable cause is usually required to accomplish a reasonable search and seizure, the court has recognized exceptions to that rule, including cases involving random drug testing, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Skinner*, 489 U.S. at 619 (citations omitted). When a valid special need is asserted, the court must "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Id.* (citations omitted).

To justify this intrusion on petitioners' Fourth Amendment rights, the "special governmental need" must be more than the government's interest in ensuring the general integrity of its work force, *Harmon v. Thornburgh*, 878 F.2d 484, 490-91 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990), or deterrence of illegal drug use, *National Federation of Federal Employees v. Cheney*, 884 F.2d 602, 614 (D.C. Cir. 1989). Instead, the government must provide evidence "of a concrete danger demanding departure from the Fourth Amendment's main rule" of probable cause. *Chandler*, 117 S.Ct. at 1303. The *Chandler* court further clarified the process for judging "special needs":

> When such "special needs" -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

117 S.Ct. at 1301.

## A. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *CHANDLER*

In *Chandler,* this court struck down a drug testing requirement for candidates for elective office in Georgia. While recognizing the public's interest in having a drug-free Governor and other high public officials, the *Chandler* court held that the suspicionless drug testing could not be justified simply because of the importance of the goal. The court found that respondents failed to present "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule" of probable cause. *Chandler,* 117 S.Ct. at 1303. Further, the record did not indicate that the hazards "broadly described" were "real and not simply hypothetical . . . ." *Id.* Instead, the court found that the purpose of the statute was to "display [Georgia's] commitment to the struggle against drug abuse," *id.* at 1304, a need that "is symbolic, not 'special'," *id.*, and "diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." *Id.* This court went on to hold that when "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* The situation here is the same as in *Chandler.*

While Petitioners agree that protecting the lives of the President and Vice President constitutes a governmental interest of great importance, the OEOB pass holders do not present any special risks to the safety of the President and Vice President. The expansion of the EOP drug testing program to cover all OEOB permanent pass holders occurred in July 1995, seven years after the EOP plan was first implemented. The expansion of testing was not based upon any increased threat to the safety of the President or Vice President from OEOB permanent pass holders. Indeed, the government presented no evidence that harm to the President or Vice-President has ever occurred or even been threatened in the OEOB, or that any employee of the EOP has ever attempted to harm the President or the Vice President at any place or time. As the district court found, neither OEOB pass holders, nor their guests, pose a physical threat to the President or Vice President that is greater than the general risk the President or Vice President faces both within and outside the OEOB from individuals not subject to random drug testing. 932 F. Supp. at 367 (A-23). *See also Hartness v. Bush*, 794 F. Supp. 15, 17 (D. D.C. 1992) ("Nor does the risk posed to the President and the Vice President by [plaintiff's] work station in the New EOB justify submitting her to drug testing any more than it would justify requiring the testing of all who have access to the Capitol and other important public buildings."). In this case, as in *Chandler*, there was no "indication of a concrete danger," but only of hypothetical harm.

Importantly, there was no analysis of the Secret Service security measures by the D.C. Circuit. *Chandler's* requirement for real, not hypothetical, harms to justify random drug testing mandates such an analysis. There is

no indication that the security measures that the Secret Service has put in place at the OEOB, *i.e.*, the pass system itself, visual scrutiny by Secret Service officers, magnetometers, the NCIC computer checks,[2] and the security details accompanying the President and Vice President, are not adequate security. Moreover, the Secret Service apparently does not share the belief that OEOB pass holders who use drugs are a threat to the President and Vice President in the OEOB. The Secret Service does not require proof that a person is subject to random drug testing to hold any type of OEOB pass or gain access to the OEOB without a pass; instead, it relies wholly on on-site physical security measures to protect the President and Vice-President. Random drug-testing of OEOB pass holders is clearly no more than a symbolic act if the Secret Service does not require it for access to the OEOB -- or even for access to the Oval Office.[3]

The appellate court chose to ignore the Secret Service security measures in place at the OEOB, claiming

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2 The National Crime Information Center ("NCIC") is maintained for law enforcement purposes and provides a database of individuals who have criminal records or otherwise previously come to the attention of law enforcement officials. *See* 60 Fed. Reg. 19774 (1995); 57 Fed. Reg. 8479 (1992) (identifying the types of individuals encompassed by the NCIC's database).

3 In recent years vehicular traffic near the White House has been restricted as a safety precaution; however, the Secret Service has not established additional limitations on access to the OEOB. Moreover, in at least one instance the Secret Service determined that an individual previously arrested on drug charges was not a threat to Presidential safety, and he was cleared for entry into the White House. *See* Anne Farris, *Secret Service Didn't Tell White House of Guest's Criminal Background*, Wash. Post, Oct. 26, 1996, at A14.

that "[i]f the horrifying scenario that the government envisions were ever to come to pass, there would be *no buffer* between the drug induced lapse . . . and the injury to the nation's interests. There would be *no opportunity* for other government employees to stop or make up for the damage done by the errant employee." 110 F.3d at 806 (A-10) (emphasis added). Those statements are flatly wrong and entirely ignore the accurate facts found by the district court regarding Secret Service on-site security measures, including the President's omnipresent security detail. The court of appeal's flawed reasoning could easily be relied upon to justify random drug testing of any person in any location when there is a possibility that the employee could be in the vicinity of the President.

Moreover, in order to find the threatened harm "direct" and "irreparable", the court of appeals focused only on the magnitude of the harm that would be caused by an injury to the President or Vice President. *See* 110 F.3d at 804, 806 (A-6, A-10). The magnitude of that harm is admitted, but that is not the issue. Instead, the court should have gone further, as required by *Chandler*, and determined whether there is in fact a "concrete" *threat* of injury from OEOB pass holders to the President and Vice President. Of that, there is no evidence. Indeed, the district court found exactly the opposite. *Stigile,* 932 F. Supp. at 366 (A-22) ("[t]he government has not submitted any evidence, only argument, that employees who use illicit drugs are susceptible to blackmail or pose a safety hazard ..."). Absent evidence of a concrete *threat* to presidential safety posed by the untested OEOB pass holders, the proffered "special need" for drug testing is *not* "sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 117 S.Ct. at 1303.

Perhaps the best indication of the court of appeals' willingness to sustain drug testing without the showing required by *Chandler* was its alternative holding that this

testing was constitutional because of the government's interest in "assuring the public that it is taking every possible precaution" to protect the President. *Stigile,* 110 F.3d at 804 (A-6). That is precisely the sort of symbolic testing that was rejected in *Chandler*. Thus, the extent to which drug testing actually affects the security of the President or Vice President was irrelevant to the D.C. Circuit. Importantly, the court's opinion was formulated before *Chandler* was decided and clearly does not meet the requirement of a real, not hypothetical, threat set forth in *Chandler*. 117 S.Ct. at 1303. The D.C. Circuit embraced symbolism to justify the drug testing at issue, in direct contravention of *Chandler*.

In effect, the court of appeals established a blanket "Presidential safety" exception to the Fourth Amendment requirement of a warrant and probable cause. Such a blanket exception is improper. *Cf. Richards v. Wisconsin,* 117 S.Ct. 1416 (1997) (rejecting a blanket exception to the Fourth Amendment "knock-and-announce" requirement for felony drug investigations). The court of appeals used the mere possibility that a drug user could be blackmailed into assisting in an attack on the President to establish a "non-attenuated" connection justifying suspicionless random drug testing of OEOB pass holders. 110 F.3d at 806 (A-10). But the link between potential blackmail of an EOP employee and an attack on the President is, at best, pure speculation -- there is no evidence in the record that OEOB pass holders are susceptible to blackmail or bribery. *Cf. Drug Tests of Whom?*, Wash. Post, Apr. 17, 1997, at A22 ("the [OEOB pass holder] group now to be tested has already been subjected to vigorous government security checks and is possibly the least likely breeding grounds for assassins that the president will encounter on any given day.").

By using the minuscule possibility of blackmail to justify random drug testing, the D.C. Circuit has now taken

that rationale far beyond its fair use, and this court should take this opportunity to place a limit on that premise. As Judge Rogers noted in her concurring opinion below, "the *Von Raab* premise that drug users are susceptible to bribery is not infinitely elastic." *Stigile,* 110 F.3d at 810 (A-19). *See also Cheney,* 884 F.2d at 614 (D.C. Cir. 1989) ("While it is certainly true that a drug-using lab technician might be susceptible to bribery, so might a drug-using antitrust prosecutor, who we concluded in *Harmon* cannot be made subject to [random] testing.").

## B. THE COURT OF APPEALS IMPROPERLY ABANDONED THE LONG-STANDING REQUIREMENT THAT THERE BE A NEXUS BETWEEN THE EMPLOYEES' JOB RESPONSIBILITIES AND THE FEARED HARM

The Executive Order pursuant to which the EOP drug testing program was established provides that the criteria for drug testing shall be based on "the nature of the agency's mission *and its employees' duties* . . . and the danger to the public health and safety or national security that could result *from the failure of an employee adequately to discharge his or her position.*" Executive Order No. 12,564, at §3(a), 51 Fed. Reg. 32,889 (1986) (emphasis added). Thus, pursuant to this Executive Order, the government must show a nexus between designation for drug testing and the employees' job duties.[4] Examples of strong governmental interests linked with work

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4 Thus, the testing at issue, unrelated to Petitioners' job duties, is unauthorized by the Executive Order, as well as unconstitutional.

responsibilities include: (1) employees who carry firearms; (2) employees who are engaged in safety sensitive occupations such as the operation of trains; and (3) employees with access to classified or sensitive information. *See Stigile*, 932 F. Supp. at 367 (citing cases)(A-24); *see also American Federation of Government Employees v. United States Dep't of Housing and Urban Development,* 924 F. Supp. 225 (D.D.C. 1996)(citing cases).

In its decision, the court of appeals recognized that in *all* prior cases upholding suspicionless drug-testing of federal employees there has been a direct link between the feared harm and the employee's inability to perform his job properly because of drug use. 110 F.3d at 804 (A-7). *See National Treasury Employees Union v. Yeutter,* 918 F.2d 968, 974 (D.C. Cir. 1990)("the government's legitimate interest in employee drug testing extends no further than its interest in workplace conduct and performance of work responsibilities."); *Harmon v. Thornburgh*, 878 F.2d 484, 490 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990) ("the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."); *American Fed'n of Gov't Employees v. United States Dep't of Housing and Urban Dev.*, 924 F. Supp 225, 230 (D.D.C. 1996)(stating that in the context of drug testing jurisprudence, the nexus between the government's interest in drug testing and the employees' work responsibilities must be more than speculative). And random drug testing has been precluded when that nexus has not been shown. *See National Fed'n of Fed. Employees v. Cheney,* 884 F.2d 603, 614 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990) (holding that random drug testing of certain civilian employees of the Department of the Army violated those employees' Fourth Amendment rights because "testing these employees lacks the necessary causal connection between the employees' duties and the feared harm").

This nexus requirement is also evident in this court's precedents. In *Skinner,* the court upheld suspicionless post-accident drug testing of railroad employees who held positions in which drug-induced job impairment could "cause great human loss." *Skinner,* 489 U.S. at 628. Similarly, in *Von Raab*, the only employees as to whom drug-testing was upheld were those who were directly involved in drug interdiction or that were required to carry a firearm. *Von Raab,* 489 U.S. at 660.

Nevertheless, the *Stigile* court negated this long-recognized nexus requirement by finding that a nexus was only required between "the employee's drug use and the danger to be avoided." 110 F.3d at 805 (A-9). Under this new nexus regime, job duties are irrelevant. For example, the government could require every government worker who drives to work to submit to random drug-testing, because an employee who uses drugs is more likely to have a traffic accident resulting in injury or death.

Surprisingly, even this meager nexus requirement was not satisfied by the evidence in this case because there was no evidence that connected drug use to a compromise of the protection afforded to the President and Vice President in the OEOB. Drug testing was not an important enough tool to be *required* to gain admittance to the OEOB.[5] Hundreds of volunteers and interns who are approved as OEOB pass holders by the EOP are admitted

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5 Moreover, positive test results are not brought to the attention of the Secret Service -- the agency most concerned with presidential security. Indeed, under the Privacy Act of 1974, the results of OMB employees' drug tests cannot be disclosed to the Secret Service. Privacy Act of 1974, 5 U.S.C. § 7301 (note), Pub. L. No. 100-71, *amended by* Pub. L. No. 102-54.

to the OEOB on a daily basis, without a requirement of random drug testing. (Indeed, these volunteers and interns are not subjected to the full field FBI background investigations to which these petitioners have been subjected.) The government provided *no* evidence that long-time OMB employees pose a greater or more immediate risk to presidential security than such volunteers or interns, or other visitors to the OEOB. As the D.C. Circuit Court noted in *Harmon*, the "public safety rationale adopted in *Von Raab* and *Skinner* focused on the immediacy of the threat." *Harmon,* 878 F.2d at 491. Such an immediate threat to the safety of the President and Vice President is not present in the instant case. The *Von Raab* and *Skinner* decisions therefore provide no basis for extending the public safety rationale to this case, where the chain of events necessary to pose a threat is more attenuated. *Id.*

The new nexus requirement is illusory because it removes job duties from consideration -- one-half of the old nexus requirement. The new nexus requirement simply splits the elements that had been heretofore considered only one side of the equation, *i.e.*, drug use and the feared harm. As is evident from the court of appeals decision, drug use can always be related to a feared harm. There is always the "possibility" that a person on drugs can potentially be blackmailed to perform a harmful act. Thus, the new nexus requirement is meaningless in the context of Fourth Amendment analysis and will allow random drug testing without any real limits.

## C. ALLOWING SUSPICIONLESS DRUG TESTING BASED ON UNSUPPORTED FEARS NOT REASONABLY RELATED TO JOB RESPONSIBILITIES WILL PERMIT DRUG TESTING OF VIRTUALLY ALL FEDERAL EMPLOYEES

In *Chandler,* this Court clarified its decision in *Von Raab*, which sustained a drug-testing program despite the absence of evidence of a drug abuse problem within the Customs Service. The Court instructed that *Von Raab* was "[h]ardly a decision opening broad vistas for suspicionless searches," but rather, should be read in its "unique" context. *Chandler*, 117 S.Ct. at 1304.

The D.C. Circuit did not have that cautionary guidance in deciding this case because the *Chandler* opinion was issued the same day as its *Stigile* opinion. The D.C. Circuit approved suspicionless searches in the absence of any evidence of: (1) a drug abuse problem among OMB employees; (2) the exposure of OMB employees to organized crime; (3) the agency's inability to subject employees to day-to-day scrutiny; or (4) a likelihood that the petitioners would come into contact with the President or Vice President while at the OEOB. Under the court's rationale, a federal employee could be drug tested whenever there is a fear that the President or Vice President might at some time be in the vicinity of that employee. Extending this rationale, the government could, for example, justify random drug testing of all congressional employees because of the "possibility" that a drug-using employee might attack the Speaker of the House or the President Pro Tem of the Senate while they were walking

down a corridor, or might be blackmailed into admitting an assassin into the Capitol or congressional office building.[6] Presumably, the "Presidential safety" exception could even serve as the basis for subjecting members of Congress and Supreme Court justices to drug testing prior to the annual State of the Union Address, or other occasions on which they may possibly come into proximity to the President.[7]

## D. THE COURT OF APPEALS FAILED TO BALANCE THE VALUE OF THE TESTING AGAINST THE INTRUSION ON PETITIONERS' FOURTH AMENDMENT RIGHTS

The D.C. Circuit's opinion is also at odds with *Chandler, Skinner* and *Von Raab* because it did not conduct

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6 While protecting the safety of the Speaker or President Pro Tem is not as strong a governmental interest as protecting the safety of the President or the Vice President, it is certainly a strong governmental interest, and these officials do not have the same level of physical protection while working in the Capitol or their offices as do the President or Vice President while they are in the OEOB. Moreover, the Speaker and the President Pro Tem are respectively third and fourth in line to become President in the event of the death, disability, resignation or impeachment of the President. *See* 3 U.S.C. § 19. Moreover, the Vice President is often in the Capitol in his capacity as President of the Senate.

7 Legislation requiring mandatory random drug testing of members of the judicial and legislative branches was introduced during the first session of the 105th Congress. *See* H.R. 310, 105th Cong. (1997) ("Legislative Branch Drug Testing Act"); H.R. 92, 105th Cong. (1997) ("Judicial Branch Drug Testing Act"). *See also* H.R. 90, 105th Cong. (1997) ("Executive Branch Drug Testing Act").

a close examination of both the public and private interests involved:

> the proffered special need for drug testing must be substantial -- important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.

*Chandler,* 117 S.Ct. at 1303.

The drug testing at issue here is clearly not vital to presidential safety. That drug testing substantially enhances the safety of the President or Vice President certainly has not been established -- for example, at no point did the appellate court address how the illegal drug using OEOB pass holder might defeat the Secret Service's on-site security measures, *i.e.*, passing through a metal detector, x-ray inspection of all bags and packages, and scrutiny by uniformed Secret Service officers. And the President and Vice President are always surrounded by their own heavy, close security. *See* Public Report of the White House Security Review at 84 ("Since [1906], plainclothes Secret Service operatives or agents have served as Presidential bodyguards. They have formed an inner perimeter of security that has continuously surrounded the President both inside and outside the White House Complex."). The on-site searches by magnetometers and x-ray machines are justified to protect the President and Vice President because they have a direct nexus to security concerns. They discover weapons meant to harm them. By contrast, acceptance of random drug testing as an effective tool for protection requires several levels of speculation, *i.e.*, (1) an employee's contact with a person who wishes to harm the President or Vice President, who knows of the employee's drug use; (2) attempted blackmail directed at harming the President or Vice President; (3) the employees

acquiescence to blackmail rather than have the drug use exposed; *and* (4) a breach of the Secret Service security measures. The government has provided no evidence to support such speculation. While the EOP's goals are laudable, this court's precedent requires that the deprivation of petitioners' Fourth Amendment rights have some tangible connection to facts, not speculation.

The appellate court's decision, in effect, accords absolute deference to the drafters of the EOP drug testing plan simply because the possibility (no matter how far-fetched) exists that someone might be a threat to presidential security. Such deference, however, is inappropriate. *See Sherrill v. Knight,* 569 F.2d 124, 128 n.14 (D.C. Cir. 1977) ("we cannot agree with the Government's argument that mere mention of the President's safety must be allowed to trump any [constitutional] issues."); *cf. United States v. Robel,* 389 U.S. 258 (1967) ("the phrase 'war power' cannot be invoked as a talismanic incantation" to override the Bill of Rights).

The applicable precedent stands for the proposition that the government cannot exempt intrusive searches from judicial review merely by asserting that presidential security is involved. Rather, courts can, and should, evaluate as a factual matter the alleged danger to the President which the government contends justifies the intrusive searches. *See Sherrill,* 569 F.2d at 128 n.14. Thus, the court of appeals erred in deferring unconditionally to the judgment of EOP security personnel.

While petitioners recognize the importance of protecting the President and Vice President, random drug testing of OEOB pass holders plays no real role in that protection. As found by the District court, this fact is demonstrated by (1) the daily admittance of hundreds of people to the OEOB without any requirement that these visitors participate in a random drug testing plan, (2) the

more than seven year delay in the EOP's designation of these two employees for testing even though they held OEOB passes, and (3) the Secret Service's reliance on on-site security measures (magnetometer, visual observation, NCIC background checks), with no requirement of random drug testing, to fulfill its primary duty of protecting the President and Vice President while they are in the OEOB. *Stigile*, 932 F.Supp. at 366-67 (A-22 - A-24).

The court of appeals could not, and did not, reject those findings as clearly erroneous under Rule 52(b). Instead, the court simply deferred to the government's asserted need to test petitioners in order to further its ability to protect the safety of the President and Vice President. In so doing, the court failed to conduct the "context-specific" inquiry required by *Chandler*, 117 S.Ct. at 1301.

## CONCLUSION

As the district court eloquently stated at the hearing on petitioners' Motion for a Temporary Restraining Order:

> There's nobody in the world more obsessed [than I] with the notion that nobody harm the President of the United States or any other public official. [The EOP] really [isn't] concerned with that here.
>
> * * *
>
> [EOP] started out by testing people with top secret clearances and then secret clearances and now you want to go to testing people who just want to work in the building. What you want to do is to guarantee that you have a government which is drug free. And that's a

commendable hope. But you're reaching too far. You're reaching too far.

Trans. at 46-47.

For the foregoing reasons, the Petition should be granted.[8]

Respectfully submitted,

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8 For the reasons discussed above, *see* footnote 1, *supra*, at a minimum the Petition should be granted, the decision of the court of appeals should be vacated, and the case should be remanded to the district court to give plaintiffs the opportunity to engage in the discovery that the district court did not allow.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued December 17, 1996 Decided April 15, 1997

No. 96-5249

ARTHUR W. STIGILE AND
ELLEN BALIS,
APPELLEES

v.

WILLIAM J. CLINTON,
PRESIDENT, ET AL.,
APPELLANTS

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Appeal from the United States District Court
for the District of Columbia
(No. 96cv01328)

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*Lowell V. Sturgill, Jr.*, Attorney, United States Department of Justice, argued the cause for appellants, with whom *Frank W. Hunger*, Assistant Attorney General, *Stephen W. Preston*, Deputy Assistant Attorney General, *Eric H. Holder*,

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Jr.*, United States Attorney, and *Leonard Schaitman*, Attorney, United States Department of Justice, were on the briefs.

*Benjamin S. Boyd* argued the cause for appellees, with whom *Arthur B. Spitzer* was on the brief.

Before: SENTELLE, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* ROGERS.

SENTELLE, *Circuit Judge*: This is an appeal from the district court's grant of an injunction prohibiting the Office of Management and Budget from subjecting certain of its employees to random drug testing. The district court held that such drug testing violated the employees' Fourth Amendment right to be free from unreasonable searches. Because we believe the random drug testing at issue here is justified as a means of protecting the safety of the President and the Vice President, we reverse.

## Background

In 1986 President Reagan issued an executive order requiring the head of each executive agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions." Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,890 (1986). Acting pursuant to this order, the Executive Office of the President ("EOP") issued its Drug-Free Workplace Plan in July 1988. The Plan authorized mandatory testing of all job applicants and "random testing" of all applicants in sensitive positions. Testing under the plan is done in accordance with the Department of Health and Human Services' ("HHS") mandatory guidelines for drug testing by urinalysis.

The Office of Management and Budget ("OMB") is one of the entities covered by the EOP plan. In the 1992 Appendix to that plan, OMB indicated which of its employees would be subject to random testing:

> With minor exceptions, all of the positions in OMB ... have been identified as testing designated positions ["TDP"].... OMB ... [has] considered the extent to which the positions considered give employees access to sensitive information at the classified level; require employees, as a condition of employment, to obtain a security clearance; require employees to engage in activities affecting public health or safety; or give employees access to areas that are frequented by the President or Vice President or areas to which access is controlled by the United States Secret Service in its role of protecting the work environment of the President and the Vice President. Presently, the only OMB positions not identified as TDP are those where an employee does not have passholder access to the Old Executive Office Building (OEOB) and there are no other testing criteria applicable to the position.

Many of the OMB's senior staff have offices in the OEOB, which is next to the White House and within the White House security perimeter. Other OMB employees are given passes because of their frequent need to visit the building for meetings with their supervisors. The OMB singles out OEOB passholders for testing because the President and the Vice President are frequently in the building. The Vice President has his office there and is in the OEOB on a daily basis. The President frequently visits for meetings with the Vice President and other officials.

OEOB passholders are able to enter the building at any time. When they enter, they are subject to magnetometer and x-ray security screening measures. OEOB passholders are also able to arrange for non-passholders to enter the building. These non-passholders must go through the normal security procedures and also have their names run through a National Crime Information Center background check.

The OMB's concern is that OEOB passholders might use their access to harm the President or the Vice President. They contend that this harm could come in one of three ways:

drug-using OEOB passholders might (1) harm the President or the Vice President themselves, (2) clear into the OEOB someone intent on harming the President or the Vice President, or (3) collect information on the comings and goings of either official for some third party intent on rendering such harm.

Appellees Arthur Stigile and Ellen Balis are Financial Economists with the OMB. While their offices are in the New Executive Office Building, they each have permanent passholder access to the OEOB. The OMB originally tested only those employees hired after 1992. In 1995, however, the OMB reviewed its testing policies and decided that all OEOB passholders, regardless of when they were hired, would be subject to testing. Stigile and Balis possess permanent OEOB passes and therefore became testing-eligible. They do not meet any of the OMB's other criteria.

In June 1995 Stigile and Balis received notice that their positions were now "Testing Designated." On June 12, 1996, Stigile was informed that he had been selected for testing. He and Balis (who has not yet been selected) immediately sought and received a temporary restraining order prohibiting the OMB from subjecting them to this testing. They also requested preliminary and permanent injunctions.

Stigile and Balis contended before the district court that the random testing of holders of permanent OEOB passes was an unreasonable search in violation of the Fourth Amendment. They noted that there are hundreds of interns and visitors who have access to the OEOB who are not required to go through this humiliating experience. The government responded by arguing that the search was justified as a means of protecting the safety of the President and the Vice President.

The district court agreed with appellees and granted a preliminary injunction barring the OMB from including them in its random drug testing program. This appeal followed.

## Analysis

The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers and effects,

against unreasonable searches and seizures, shall not be violated...." U.S. CONST. amend. IV. Government-compelled urinalysis is a search for purposes of the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). As such, it is impermissible if it is unreasonable.

In criminal cases, a government search is ordinarily unreasonable unless it is conducted pursuant to a judicial warrant issued upon probable cause. *Id.* at 619; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). In *Skinner* and *Von Raab*, however, the Court acknowledged that there are exceptions to the warrant requirement for cases where a search serves special governmental needs "beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665. In such cases the reasonableness of a search is determined by balancing "the public interest in the ... testing program against the privacy concerns implicated by the tests, without reference to [the] usual presumption in favor of the procedures specified in the Warrant Clause." *Von Raab*, 489 U.S. at 679. We have applied this same test to numerous other proposed drug testing programs in recent years. *See, e.g., National Treasury Employees Union v. United States Customs Serv.*, 27 F.3d 623, 626 (D.C. Cir. 1994); *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C. Cir.), *cert. denied*, 502 U.S. 1020 (1991); *Hartness v. Bush*, 919 F.2d 170, 172 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1251 (1991); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 971 (D.C. Cir. 1990); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 889 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 608 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); *Harmon v. Thornburgh*, 878 F.2d 484, 487 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

The public need advanced by the proposed search at issue here is the protection of the President and the Vice President. This is clearly "beyond the normal need for law enforcement." *Von Raab* and *Skinner* require therefore that we determine whether the search is reasonable by balancing the public

interest served by the testing against the OEOB passholders' privacy interest in not being tested.

*The Interests*

The public interest the government is seeking to protect is undoubtedly of the utmost importance. Few events debilitate the nation more than the assassination of a President. The Supreme Court has recognized the importance of this interest. In *Watts v. United States*, the Court said, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." 394 U.S. 705, 707 (1969) (per curiam); *see also White House Vigil for ERA Comm. v. Watt*, 717 F.2d 568, 572 (D.C. Cir. 1983) ("The balance that must be struck between First Amendment rights and other public interests is especially delicate when one of those interests is the safety of the President."); *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) ("Clearly, protection of the President is a compelling, even an overwhelming interest . . . ." (internal quotations and citations omitted)).

We note, lest we create an inadvertent precedent by negative implication, that the government may have an additional interest not asserted in this case. That is, in addition to *actually* protecting the President, the government also has an interest in assuring the public that it is taking every possible precaution to ensure that he is safe. The assassination of a President has an enormously disruptive impact on the life of the nation; the government has an interest in reducing the public's fear that it will have to endure this sort of disruption. Public measures to protect the President play an important role in accomplishing this goal.[1] *Cf. Harmon*, 878 F.2d at 497 (Silberman, J., concurring in part and dissenting in part) (arguing that the American people's interest in ascertaining

[1] This is not to suggest that ungrounded fears would justify searches. We only mean to make clear that we do not preclude the possibility that assurance of the public that the President's safety is being adequately protected could be a factor in a Fourth Amendment analysis.

the full commitment of "drug warriors" to the war against drugs justifies search by urinalysis).

It is also true, however, that the appellees have a serious and legitimate privacy interest in not being subject to urinalysis. The HHS regulations that govern the EOP's testing minimize the intrusion into this interest. *Von Raab*, 489 U.S. at 672 n.2. In addition, appellees' expectation of privacy is lessened because they occupy positions that require stringent background checks. *United States Customs Serv.*, 27 F.3d at 629. These factors do not, however, eliminate the appellees' privacy interest altogether. Urinalysis still requires an employee to perform a quintessentially private act in the presence of another. In *Skinner* the Court noted that it would "not characterize [the] additional privacy concerns [raised by urinalysis] as minimal in most contexts." 489 U.S. at 626. In *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396 (1995), the Court cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."

*Balancing the Interests*

As we have previously noted, the Supreme Court in *Von Raab* and *Skinner* did not "articulate an analytical rule by which legitimate drug-testing programs could be distinguished from illegitimate ones." *Harmon*, 878 F.2d at 488. *Skinner* and *Von Raab* require us rather to perform a case-by-case balancing of interests. Despite the fact-specific nature of this inquiry, there are certain broad themes in the case law that guide us in our disposition of this case.

Appellees urge us to rely on the principle that there must be a "causal connection between the employees' duties and the feared harm." *National Fed'n of Fed. Employees*, 884 F.2d at 614. In every case where the Supreme Court or this court has upheld a drug testing program for federal employees, the feared harm has been directly related to the employee's execution of his job. In *Skinner* the Department of Transportation mandated testing of employees involved in serious accidents and authorized testing of employees who had violated certain safety rules. 489 U.S. at 606. The Court

decided that this testing was reasonable because it helped the government both to deter future accidents and to learn the cause of accidents that had already occurred. *Id.* at 628–30. In *Von Raab* the Customs Service required urinalysis of employees who sought transfer or promotion to positions that involved drug interdiction, use of a gun, or access to sensitive information. 489 U.S. at 660–61. The Court allowed the program for the first two categories and remanded for more information for the third. It held, "[i]n light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the [program] cannot be deemed unreasonable." *Id.* at 674.

In the cases from our circuit on this question, the link between the harm to be avoided and the employee's execution of his job has been just as close. *See, e.g., Willner,* 928 F.2d at 1188 ("In our ... decisions concerning random drug testing of incumbents, the balance we struck turned to a large extent on the nature of the employee's position."). In *National Treasury Employees Union v. United States Customs Serv.,* we allowed testing of employees with access to the computer databases the Customs Service used to determine which ships were to be searched for drugs. 27 F.3d at 630. In *American Fed'n of Gov. Employees v. Skinner,* we referred to the "extraordinary safety sensitivity of the bulk of the" positions covered by a program held to be reasonable. 885 F.2d at 890; *see also National Fed'n of Fed. Employees,* 884 F.2d at 610 (allowing drug testing for some employees for whom a "single drug-related lapse by any covered employee could have irreversible and calamitous consequences"); *Harmon,* 878 F.2d at 490 ("*Von Raab* ... suggests that the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation.").

Appellees use these cases to argue that because the harm the government is seeking to prevent has nothing to do with the performance of their duties as economists for the OMB, the drug testing program must be unreasonable. They con-

tend that random drug testing of government employees should be upheld only when there is a clear nexus between the employee's performance of his job and the harm that is sought to be avoided; that there is no such clear nexus here; and that therefore this search must be unreasonable. We reject this argument.

Appellees misunderstand the nature of the nexus requirement. The nexus requirement is not a mechanical test, requiring the court to ask nothing more than whether the harm to be avoided is a result of the tested employee's inability to perform his job properly. The nexus to be examined is not that between the job and the harm, but rather that between the risk posed by a drug-using employee and the evil sought to be prevented by the testing. We note that even in *Harmon*, arguably the strongest case in favor of appellees' position, the court cited *Von Raab* as "suggest[ing] that the government may search its employees only when a clear, direct nexus exists between the nature of the employees' duty and the nature of the feared violation." 878 F.2d at 490. Thus, the *Harmon* formulation describes the nexus as between the duty and the danger, not between the performance level and the danger. In this case, and perhaps others, a duty which places the employee in a position to render harm can give rise to that nexus even when the feared act by the employee would not itself be a normal part of that duty. When the link between the risk and the evil has been direct and immediate we have determined that a proposed government search is reasonable.

What the nexus requirement demands then is that there be an immediate, non-attenuated connection between the employee's drug use and the danger to be avoided. This is why in *Harmon* we allowed the Department of Justice to test employees holding top secret national security clearances, but did not allow the Department to test all federal prosecutors and all employees having access to grand jury proceedings. 878 F.2d at 496. For employees with access to top-secret information, a single mistake could be disastrous, while for many other Department of Justice employees the risk was not so immediate. As we said there:

> The public safety rationale adopted in *Von Raab* and *Skinner* focused on the *immediacy* of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences.... *Von Raab* provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.

*Id.* (emphasis in original). Likewise, in *National Fed'n of Fed. Employees*, we allowed the Department of the Army to test randomly many different categories of employees, but did not allow it to extend the program to employees who worked in the Army's Drug Testing Laboratories. We acknowledged the interest that the government had in ensuring that these employees were drug-free, but still did not allow the testing, because "a drug-related lapse by such an employee does not portend either direct or irreparable harm, as would, for example, a lapse by an air traffic controller, pilot, or guard." 884 F.2d at 614.

In this case, the harm that the government is seeking to avoid has the necessary immediate connection to the risk posed by a drug-using employee. If the horrifying scenario that the government envisions were ever to come to pass, there would be no buffer between the drug-induced lapse by the employee and the injury to the nation's interests. There would be no opportunity for other government employees to stop or make up for the damage done by the errant employee. *See, e.g., Skinner*, 489 U.S. at 628; *Von Raab*, 489 U.S. at 670–71. The harm would be both "direct" and "irreparable." *National Fed'n of Fed. Employees*, 884 F.2d at 614. The appellees' nexus argument therefore fails.

Appellees also argue that the feared harm in this case is no more than "sophistic speculation." They seem to suggest that because it is extremely unlikely that an OEOB passholder would use that access to harm the President, then it must be unreasonable for the OMB to require testing on this basis. While we agree that the likelihood that the feared harm will occur is a factor to be considered, we do not agree that the

low probability in this case makes the government's search unreasonable. The Supreme Court has suggested that the more serious the harm that is sought to be avoided, the more likely it is that a search that is designed to prevent the harm will be thought to be reasonable. In *Von Raab* the Court wrote, "[w]here, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." 489 U.S. at 674–75. The *Von Raab* Court elaborated on this point by citing in a footnote to circuit court opinions upholding suspicionless searches of passengers and their baggage at airports. The Court quoted the following passage from one of these opinions:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage....

*Von Raab*, 489 U.S. at 675 n.3 (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.) (emphasis in original)).

In this case the government is trying to prevent an extremely serious harm. Given this, we should hold for the government so long as there is an adequate connection between the harm sought to be avoided and the drug testing program. Here the connection is clear. This court has before noted the possibility that a drug user could be vulnerable to bribery or intimidation. *United States Customs Serv.*, 27 F.3d at 629. It is possible that a drug-using OEOB passholder could be blackmailed into using his access to the building to assist in an attack on the President. Given the importance of protecting the President's safety, this is all that is required to make this particular search reasonable. It therefore does not violate the Fourth Amendment.

Appellees make one final argument that must be addressed. They argue that random drug testing of OEOB

passholders cannot be reasonable because the EOP does not test the hundreds of interns, temporary visitors, reporters, and contractors who have the same access to the OEOB as do holders of permanent OEOB passes. There are two reasons why this argument fails. First, this case is about whether it is reasonable to administer tests to the holders of permanent passes. What the OMB does with other groups cannot control a Fourth Amendment challenge to the drug testing of permanent passholders. We cannot require the government to attack all aspects of a problem before we will uphold its right to act against a single aspect. Second, there is a significant difference between the access given to permanent passholders and the access given to these other groups. Non-permanent passholders can enter the building on a temporary basis only. Interns are granted the most access of any other group, and they have access for a maximum of three months. Permanent passholders are able to observe the interior of the building for months on end. They are thus in a superior position to acquire information on the comings and goings of the President and the Vice President. They are therefore a far more valuable source for blackmailers who wish to harm either official.

## Conclusion

Because the government's interest in protecting the safety of the President and the Vice President within the White House security perimeter outweighs appellees' interest in not being subject to urinalysis, the suspicionless drug testing of OEOB passholders is not an unreasonable search. It does not, therefore, violate the Fourth Amendment. The district court's order is reversed.

ROGERS, *Circuit Judge*, concurring: Given the precedents in which "this circuit has inched its way even farther from the core holdings in [*Von Raab* and *Skinner* [1]], repeatedly mollified by the fact that only a minuscule extra step was needed to arrive an at outcome arguably supported by precedent," *National Treasury Employees Union v. United States Customs Serv.*, 27 F.3d 623, 631 (D.C. Cir. 1994) ("*NTEU*") (Wald, J. dissenting), the court's conclusion in the instant case is predictable. *Cf. Von Raab*, 489 U.S. at 680–87 (Scalia, J., dissenting); *Hartness v. Bush*, 919 F.2d 170, 180 (D.C. Cir. 1990) (Edwards, J., dissenting), *cert. denied*, 501 U.S. 1251 (1991). Following the Supreme Court in *Von Raab*, this court has already accepted the proposition that drug users pose a security risk by reason of their increased susceptibility to blackmail or bribery. *Von Raab*, 489 U.S. at 669–70; *NTEU*, 27 F.3d at 629. Given the unique access to areas within the White House security perimeter that an Old Executive Office Building ("OEOB") pass provides, the court could scarcely avoid concluding that the drug testing program of the Executive Office of the President ("EOP") is reasonably related to the goal of preventing harm to the President and Vice President. Despite the security procedures in place at the OEOB [2] and the absence of evidence of a specific threat

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[1] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 601 (1989).

[2] The security measures include a background check by the Federal Bureau of Investigation of every employee who is issued a permanent OEOB pass; the employee and all other persons interviewed are asked about illegal drug use, and the background checks are updated at five-year intervals. Entry into the OEOB is restricted to passholders and pre-approved visitors who are cleared by passholders. Further, an OEOB passholder can only "clear" a non-OEOB passholder into the building for a specific appointment, and the Secret Service conducts a background check on that person with the National Crime Information Center. In addition, all persons entering the building must pass through a magnetometer and place any bags or packages in an x-ray machine. Once inside,

caused by a drug-using employee of the Office of Management and Budget ("OMB"),[3] the devastating impact that an assassination of the President would have on this country and its people, and people and nations throughout the world, weighs in favor of special precautions. *See Von Raab*, 489 U.S. at 674–75 & n.3.

That is not the end of our inquiry, however. In *Von Raab*, the Supreme Court instructed that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, the court must balance the

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persons are free to move about the building, except for certain restricted areas, such as the Vice President's office. However, attendance at any function or event attended by the President or Vice President requires a special invitation. At all times, moreover, the President and the Vice President are protected by Secret Service agents.

Although the President and Vice President, by the nature of their positions, are always at some risk, a 1995 report by the Treasury Department states that:

> [a]lthough ... Presidents have been exposed to deadly or life-threatening assaults with frightening regularity, not one of these assaults has occurred within the White House Complex. Indeed, each assassination or potentially deadly assassination attempt has occurred when the Presidential protectee was away from the White House, in the proximity of a crowd.

U.S. DEP'T OF TREASURY, PUBLIC REPORT OF THE WHITE HOUSE SECURITY REVIEW 92 (1995). It is unclear from this statement whether less serious assaults have occurred within the White House security perimeter; however, recent events by outside attackers indicate that but for intervention more serious harm could have resulted. *See, e.g, United States v. Duran*, 96 F.3d 1495 (D.C. Cir. 1996).

[3] The government advises that there were six positive drug tests by EOP employees under the EOP plan between 1989 and 1996. Among OMB employees, drug testing has shown less than a 1% positive testing rate since 1987. As the government notes, however, one of the principal justifications for random drug tests is their deterrent effect, and it is impossible to know with certainty what the incidence of drug use would have been in the absence of such tests.

individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 665–66; *see also Skinner*, 489 U.S. at 619–20. The question here is whether the privacy interests of OMB employees holding OEOB passes in not being subjected to random urine testing outweighs the possible risk of physical harm to the President and Vice President.

It is undeniable that protection of the President and Vice President is of paramount importance. The government has a compelling interest not only in protecting the lives of the President and Vice President, but in providing them a safe working environment where they can carry out their official duties without fear of physical danger.[4] Still, some governmental actions in the name of Presidential security would not pass constitutional muster. Few today would argue, for example, that the government could conduct a random suspicionless search of an OMB employee's home merely on the off chance that the search might reveal evidence of a threat to the President.

I write separately, therefore, to emphasize the limits of our holding in applying *Von Raab's* balancing test to a threat that relates to the situs of employment and not the nature of the job itself, and to make clear that under *Von Raab* even a governmental interest of the most compelling order must still be weighed against the competing privacy interests at stake. Three main factors influenced our holding and help define its limits: (1) the need to enable the President and Vice President to do their jobs; (2) the access needs of and consequences for OMB passholders; and (3) the nature of the drug testing program.

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[4] There is no reason to address whether the government has "an interest in assuring the public that it is taking every possible precaution to ensure that [the President] is safe." Majority opinion at 6. The government has not asserted that interest and there is no evidence whether the public is even aware that OMB employees are subject to drug testing.

First, the factual setting itself limits the holding. The OEOB is directly adjacent to the White House and inside the White House security perimeter. The security perimeter is marked by a fence that runs along Pennsylvania Avenue, Seventeenth Street, East Executive Avenue, and across the front of the White House in Northwest Washington, D.C. Apart from the Executive Mansion itself, the OEOB is the only building inside this perimeter. This is the area where the President and Vice President regularly work; it is where they regularly hold meetings and receive foreign dignitaries and members of Congress; it is the area where the President and his family live. In other words, for the President and Vice President to perform *their* jobs in a reasonable fashion, heightened security measures may be justified in this well-defined and limited geographic area.

Second, because senior officials in the OMB have their offices in the OEOB, OMB employees whose own offices are located outside of the security perimeter may from time to time be required to come within the perimeter in order to perform their jobs. Consequently, OMB requires that all of its employees—except a small number of temporary student employees—have passes that give them free access to the OEOB. All of these employees are designated for random drug testing, notwithstanding the fact that many of them, like appellees, do not have access to any secret or top secret national security information.[5] The OMB passholders have continual access to the OEOB that affords them unique

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[5] As required by the EOP security plan, OMB considered four criteria in identifying which employees would be subject to drug testing:

> the extent to which the positions considered give employees access to sensitive information at the classified level; require employees, as a condition of employment, to obtain a security clearance; require employees to engage in activities affecting public health or safety; or give employees access to areas that are frequented by the President or Vice President or areas to which access is controlled by the United States Secret Service in its role of protecting the work environment of the President and the Vice President.

vantage points to observe the President and Vice President. Once inside the OEOB, OMB employees have an unrestricted view of the West Wing and grounds of the White House, as well as the opportunity to track the comings and goings of the President and Vice President. While this information is not "secret" in the literal sense of the word, it is "sensitive" information that is not readily available to the general public, and makes OEOB passholders, albeit in a limited way, analogous to government employees whose access to secret or top secret information causes them to be subject to random drug testing.[6] *See Hartness*, 919 F.2d at 172; *Harmon v. Thornburg*, 878 F.2d 484, 491 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

The access granted to OMB employees is not temporary, as is true for interns, or limited by a discrete task, as would be true of persons repairing a broken fixture, for example. Passholders also have authority to obtain access for others into OEOB, an authority non-passholders lack. While the purpose of such entries is limited to scheduled meetings, the passholders' authority is nonetheless unique as compared to others who have access to the OEOB. Here, the government has reasonably determined that appellees need this authority to perform their duties effectively, and that, consequently, they must be subject to the heightened security procedures that apply inside White House security perimeter.[7]

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[6] In acknowledging that "it is plain that certain forms of public employment may diminish privacy expectations," *Von Raab*, 489 U.S. at 671, the Supreme Court stated that:

> We ... agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test ... especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinanalysis test.

*Id.* at 677.

[7] Appellees' contention that they are willing to return their OEOB passes is unavailing. The court rejected a similar contention

Third, the drug testing program is conducted in a manner that minimizes intrusion into individual privacy. Under mandatory guidelines, EOP employees who are selected for random drug testing are permitted to provide urine samples in a rest room stall or similar enclosure. Although a monitor of the same gender may be present, the monitor is not permitted to observe the employee producing the sample unless there is reason to believe the employee will alter or substitute the urine specimen. Absent a court order, or as required by the United States to defend against a challenge to an adverse personnel action, the test results may be disclosed only to a limited number of EOP officials. Like the drug testing protocols this court and the Supreme Court have addressed in previous cases, these procedures "minimize the intrusiveness of the ... drug-screening program." *Von Raab*, 489 U.S. at 672 n.2; *see also Harmon*, 878 F.2d at 486. While a more invasive search might violate the Fourth Amendment's reasonableness requirement, the risk of harm in the instant case outweighs the intrusion on appellees' privacy.

Although the government might have chosen other means of detecting drug activity by its employees, the Supreme Court has made it clear that the reasonableness of a drug testing program "does not necessarily and invariably turn on the existence of alternative 'less intrusive' means." *Skinner*, 489 U.S. at 629 n.9 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)); *see also National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 610 (D.C. Cir. 1989), *cert. denied.*, 493 U.S. 1056 (1990). The fact that appellees work in a

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in *Harmon* with respect to holders of top secret clearances, noting that although many such employees rarely see top secret information, "[t]he whole point of granting top secret clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." 878 F.2d at 492. Similarly, the purpose of requiring OMB employees to hold OEOB passes is to provide their employer with flexibility so that they may enter the OEOB at any time on short notice. Furthermore, to the extent that appellees' duties require them to enter the OEOB, return of the passes would not eliminate the risk the government seeks to avoid.

traditional office environment where drug use might be detected by individual monitoring, while relevant to the Fourth Amendment analysis, is not dispositive. *See NTEU*, 27 F.3d at 629; *Harmon*, 878 F.2d at 489. Although appellees may object that the government has not put forth evidence to suggest that they or their co-workers are susceptible to bribery or blackmail, the Supreme Court has already considered and rejected that argument. *See Von Raab*, 489 U.S. at 674–75; *id.* at 683–84 (Scalia, J., dissenting).

Accordingly, consistent with the required balancing test, and with these three factors in mind, the court concludes that the risk of harm to the President and Vice President is sufficient to outweigh the individual OMB passholder's privacy interests, given the measures taken by the government in the drug testing program to minimize the intrusion into personal privacy that urinalysis entails. As the court notes, it is "extremely unlikely" that the harm the government fears will ever come to pass, especially given the other security measures in place at the OEOB. Majority opinion at 10. Nonetheless, so long as the "possible harm against which the Government seeks to guard is substantial," *Von Raab*, 489 U.S. at 674–75, and has some reasonable possibility of occurring, a drug testing program, as here, that sufficiently minimizes the intrusion into employees' privacy does not violate the Fourth Amendment. Although the *Von Raab* premise that drug users are susceptible to bribery is not infinitely elastic, and could not be used to justify drug testing in every case, *see NFFE*, 884 F.2d at 614–15; *Harmon*, 878 F.2d at 490–91, here it is sufficient to tip the balance in the government's favor.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR W. STIGILE AND ELLEN BALIS,

Plaintiffs,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON AND JOHN B. ARTHUR, ASSOCIATE DIRECTOR FOR ADMINISTRATION, OFFICE OF BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

Civil Action No. 96-01328 (CRR)

**APPEARANCES**

FOR THE PLAINTIFFS: Benjamin S. Boyd and Richard J. Vacura, Attorneys, Piper & Marbury L.L.P., Washington, D.C., and Arthur B. Spitzer, Attorney, American Civil Liberties Union Fund of the National Capital Area, Washington, D.C.

FOR THE DEFENDANTS: Susan K. Rudy and Jeffrey S. Markowitz, Attorneys, Civil Division, U.S. Department of Justice, Washington, D.C., with whom Frank Hunger, Assistant Attorney General, and Eric H. Holder, Jr., U.S. Attorney, appeared on the briefs.

**MEMORANDUM OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The two plaintiffs are long-time career Economists with the Office of Management and Budget, Executive Office of the President

(EOP). Their offices are located in the New Executive office Building on Lafayette Square in Washington, D.C., but they hold passes to the Old Executive Office Building (OEOB) so as to enable them to see their supervisors. Pursuant to the EOP's drug testing plan promulgated pursuant to Executive Order 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986), the plaintiffs are subject to random drug testing because they hold regular passes to the OEOB. On June 12, 1996, plaintiff Stigile was randomly selected for drug testing. Although in a "testing-designated position," plaintiff Balis has not yet been randomly selected for testing.

The government contends that the drug testing of the plaintiffs is necessary to ensure the safety and security of the President and Vice-President. The question presented is whether, under the facts of this case, the plaintiffs have a Fourth Amendment right to refuse to submit themselves to a random drug test.[1]

On July 10, 1996, with the consent of the defendants and pursuant to Rule 65(e) of the Federal Rules of Civil Procedure, the Court held a combined hearing on the plaintiffs' motion for a preliminary injunction and the merits of the plaintiffs' Complaint. After consideration of all the evidence presented in this case, the Court makes the following factual findings and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure:

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1 In addition to their claim brought pursuant to the Fourth Amendment, the plaintiffs' assert in their Complaint claims under the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Because the parties did not brief or argue this matter, and because the Court shall enjoin the testing of the plaintiffs pursuant to the Fourth Amendment, the Court will not address these additional claims.

## FINDINGS OF FACT

1. The plaintiffs hold regular passes to the OEOB which provide them with 24 hour access to common areas of that building as well as to picnic grounds outside the building.

2. There is no evidence in this case that OEOB passholders are more likely to use drugs than not, nor is there any evidence of a drug abuse problem by OEOB passholders.

3. The plaintiffs are subject to random drug testing under the EOP's program solely because the plaintiffs hold regular passes to the OEOB.

4. The government has not submitted any evidence, only argument, that employees who use illicit drugs are susceptible to blackmail or pose a safety hazard to fellow workers in a white collar office environment. However, based on the Supreme Court's holding in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664 (1989), the Court finds that employees who use drugs, either on or off-duty, are susceptible to blackmail.

5. It is undisputed that the plaintiffs do not have a security clearance or access to classified documents, nor do they hold pases to the White House.

6. Certain common areas, or "vantage points", of the OEOB and the picnic grounds outside the building have views of the West Wing of the White House and the surrounding White House grounds. However, the facts belie the government's allegation that the plaintiffs' access to the aforementioned "vantage points" at the OEOB and the picnic area provides the plaintiffs and their guests with "sensitive" or secret information regarding the OEOB, the White House grounds, and the comings and goings of the President and Vice President:

a. A number of other federal buildings on Lafayette Square in Washington, D.C. also have views of the West Wing of the White House and the surrounding grounds;

b. Approximately 600 interns and a number of other individuals not subject to drug testing, including federal employees, contractors, and private sector maintenance personnel, have access to the same common areas of the OEOB as regular OEOB passholders. Many of these non-regular OEOB passholders have sufficient access to the vantage points to make the same observations about the OEOB, the White House grounds, and the comings and goings of the President and Vice President as do regular OEOB passholders;

c. The domestic and foreign press have access to the White House Press Room which is located on the north side of the West Wing of the White House, is closer to the West Wing and Oval Office than the OEOB, and has a view of the White House grounds.

d. There is no evidence that individuals entering the OEOB, including regular passholders, visitors, and others, are asked by the Secret Service to keep secret any information they observe from vantage points in the OEOB.

7. Based on the following facts, OEOB passholders and their guests do not have unique or special access to the President or Vice President such that the regular passholders or their guests pose a physical threat to the President or Vice President that is greater than the general risk the President or Vice President faces within and outside the OEOB when confronted with individuals not subject to random drug testing:

a. The entrance to the Vice President's office at the OEOB is manned by a Secret Service Agent, is always locked while the Vice President is in his office, and is restricted;

b. Although the President and Vice President visit the OEOB often, and although the President and Vice President may stroll the White House grounds, they are accompanied by their ever present Secret Service detail during said visits or strolls;

c. All entrants to the OEOB, regardless of passholder status, must pass through a magnetometer, pass their bags through an x-ray machine, and are subject to search by Secret Service agents;

d. Attendance at any event in the OEOB involving the President or Vice President requires a special invitation.

## CONCLUSIONS OF LAW

1. The Fourth Amendment prohibits the government from conducting unreasonable searches. U.S. Const. amend. IV.

2. A random drug test is a search within the meaning of the Fourth Amendment. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).

3. The reasonableness of a search, in the context of a random drug test not for the purpose of law enforcement, "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'" Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 616-18 (1989).

4. The Supreme Court and the Court of Appeals for the District of Columbia Circuit have found a strong governmental interest under the following circumstances, **none of which are present in the case at bar**: when an employee carries a firearm, see National Fed'n of Federal Employees v. Cheney, 884 F.2d 603, 612-13 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990); when an employee is engaged in a sensitive occupation such as the operation of a train, see Skinner, 489 U.S. at 628; when an employee has access to classified or sensitive information, see Von Raab, 489 U.S. at 677; National Treasury Employees Union v. United States Customs Serv., 27 F.3d 623, 629 (D.C. Cir. 1994) (NTEU); Hartness v. Bush, 919 F.2d 170, 173-74 (D.C. Cir.), cert. denied, 501 U.S. 1251 (1991); and when testing of high school athletes "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care," Vernonia School Dist. v. Acton, ___ U.S. ___, 115 S. Ct. 2386, 2396 (1995).

5. A background investigation of a federal employee may lower, but does not eliminate, that employee's expectation of privacy

regarding his or her bodily fluids, absent other intrusions (such as reuqired medical examinations) not present in this case which may further diminish expectations of privacy. Cf. NTEU, 27 F.3d at 629.

6. The governmental interest in protecting the President and Vice President, while laudatory and essential, is not credible under the facts of this case. There is no evidence that the plaintiffs or their guests have access to "sensitive" information or that they have unique or special access to the President or Vice President such that the plaintiffs or their guests pose a physical threat to the President or Vice President. Accordingly, since the government does not have a legitimate interest in drug testing the plaintiffs, the government has no interest to tip the Constitutional scales in favor of drug testing as applied to the particular facts of this case.

7. In addition, while this Court abhors the sale, use, or distribution of drugs, it will not suspend the Constitution and the rights thereunto appertaining to federal employees when the government has not presented evidence implicating the types of circumstances set forth in ¶ 4 of this Court's conclusions of law. While it may be that the government's program with respect to regular OEOB passholders may need revision, what revision is precisely needed is for another day and another case. The Secret Service, responsible for the safety of the President and Vice President and not a party to this case, and good lawyers can obviously deal with any exigencies that may exist regarding the security of the leaders of our Country, which, as the Court has already said, is essential for them and the general welfare of this Republic.

July 24th, 1996

s/s

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR W. STIGILE AND ELLEN BALIS,

Plaintiffs,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON AND JOHN B. ARTHUR, ASSOCIATE DIRECTOR FOR ADMINISTRATION, OFFICE OF BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

Civil Action No. 96-01328 (CRR)

ORDER

Based on the Court's Findings of Fact and Conclusions of Law of even date herewith, it is, by the Court, this 24th day of July, 1996,

ORDERED that the defendants are enjoined from administering a random drug test to the plaintiffs on the ground that the drug testing program, as applied to the plaintiffs under the particular facts of this case, violates their Fourth Amendment right to be free from an unreasonable search.

July 24th, 1996

s/s
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 96-5249

September Term, 1996
96cv01328

Arthur W. Stigile and Ellen Balis,
Appellees

v.

William J. Clinton, President and John B. Arthur,
Associate Director for Administration Office of
Management and Budget Executive Office of the
President New Executive Office Building,
Appellants

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

**ORDER**

Upon consideration of appellees' petition for rehearing filed May 30, 1997, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/s
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 96-5249 September Term, 1996
96cv01328

Arthur W. Stigile and Ellen Balis,
Appellees

v.

William J. Clinton, President and John B. Arthur, Associate Director for Administration Office of Management and Budget Executive Office of the President New Executive Office Building,
Appellants

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

**ORDER**

Appellees' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/s
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the suggestion. Her statement is attached.

Wald, Circuit Judge:

I would grant rehearing in banc because I do not believe that the grounds upon which the panel justified random drug testing for all employees of the Old Executive Office Building comport with the more stringent criteria laid down by the Supreme Court in its recent Chandler v. Miller decision. See Chandler v. Miller, 117 S.Ct. 1295 (1997). There is no history here of any threat to the safety of the President or Vice President from government employees holding permanent passes to the Old Executive Office Building; indeed, the rules provide for rather lenient access by unscreened visitors to this same area. Presumably, the backgrounds of EOB employees have been checked at the time they were hired, their behavior can be routinely supervised and the "special" justification here--that the President and Vice President should be allowed to move about free from the threats posed by drug abusers--applies throughout the government, and even to areas where these officials are scheduled to make public appearances. This decision simply cuts too wide a swath through employees' liberty interests, and should be reheard.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 96-5249 September Term, 1996

Arthur W. Stigile and Ellen Balis,
Appellees

v.

William J. Clinton, President, et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 96cv01328)

---

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

**JUDGMENT**

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District of Columbia appealed from in this cause is hereby reversed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/s
Robert A. Bonner
Deputy Clerk

Date: April 15, 1997

Opinion for the Court filed by Circuit Judge Sentelle.
Concurring opinion filed by Circuit Judge Rogers.

Federal Register PRESIDENTIAL DOCUMENTS

Vol. 51, No. 180

Wednesday, September 17, 1986

Title 3-

Executive Order 12564 of September 15, 1986

The President

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good

judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities.

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an

employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. Drug Testing Procedures.

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling,

and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee use illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. Coordination of Agency Programs.

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. Definitions.

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2102(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and the employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under

Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency had designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employee's progress while in treatment.

Sec. 8. Effective Date. This Order is effective immediately.

s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

(FR Doc. 86-21166
Filed 9-15-86; 3:47 pm)
Billing code 3195-01-M

Editorial note: For the President's remarks of September 15, on signing EO 12564, see the Weekly Compilation of Presidential Documents (vol. 22, no. 38).

## OFFICE OF MANAGEMENT AND BUDGET

A. Statement of Agency Mission

The Office of Management and Budget (OMB) is a staff agency within the Executive Office of the President responsible for developing and supporting the President's budget and legislative programs and has lead responsibility for general management and regulatory reform efforts throughout the Executive Branch of the Federal government. The major functions of OMB are to:

- advise the President on fiscal and economic policies for the Nation;
- prepare the budget and formulate the Government's fiscal program;
- supervise and control the administration of the Executive Branch budget;
- clear and coordinate departmental recommendations for proposed legislation and for Presidential action on bills passed by Congress;
- assist in the consideration, clearance and preparation of Executive Orders and Presidential proclamations;
- implement major new initiatives on information policy, paperwork reduction and regulatory reform;

- provide overall direction of procurement policies, regulations and procedures for Executive Branch agencies;

- review the organizational structures and management procedures of the Executive Branch to assure that they produce intended results;

- keep the President advised of agencies' activities: proposed, actually initiated and completed.

Because of its unique position as a central management agency, the OMB staff has direct involvement in Presidential decisionmaking. In addition, OMB staff has frequent interaction with highlevel policy officials throughout the Government. As a result, OMB staff has access to classified and other sensitive information concerning all Federal programs. Access to this kind of sensitive information, as well as the close physical proximity of OMB staff to the President and senior White House officials, demands a staff of the highest integrity and trust. All positions have been determined to be sensitive as defined in Executive Order 12564.

B. Testing Designated Positions Listing and Justification Statements

1. The following sensitive positions are identified as testing designated positions since the individuals filling these positions serve under Presidential appointments with Senate confirmation:

Director

Deputy Director

Administrator, Office of Federal Procurement Policy

2. The following sensitive positions are identified as testing designated positions since they require Top Secret security clearance or other special security clearances. These positions regularly deal with sensitive national security, law enforcement, nuclear or other technical issues requiring specific clearances, and/or are involved with performing sensitive OMB policy functions requiring a high degree of trust and confidence:

Executive Assistant to the Director, DO

Executive Assistant to the Deputy Director, DO

Executive Associate Director, DO

Associate Director for Communications and Public Liaison, DO

Staff Assistant to the Deputy Director, DO

Confidential Assistant to the Director, DO

Assistant Director for Public Affairs, PA

General Counsel, GC

Deputy General Counsel, GC

Associate Director for Legislative Affairs, LA

Assistant Director for Legislative Reference, LRD

Associate Director for Economic Policy, EP

Associate Director for Privatization, DO

Assistant Director for Budget Review, BRD

Administrative Assistant, BRD

Chief, Resources Systems Branch, BRD

Associate Director for NSIA, AD/NSIA

Budget Examiner(s), IAD

Deputy Associate Director for International Affairs, IAD

Chief, International Security Affairs Branch, IAD

Secretary, IAD Chief, StateUSIA Branch, IAD

Deputy Associate Director for National Security, NSD

Budget Examiner(s), NSD

Chief, Intelligence Branch, NSD

Chief, Air Force Branch, NSD

Chief, Navy Branch, NSD

Chief, Army Branch, NSD

Deputy Chief, NSD

Secretary(s), NSD

Operations Research Analyst, NSD

Policy Analyst, NSIA/SSD

Secretary, NSIA/SSD

Deputy Associate Director for Special Studies, NSIA/SSD

Associate Director for HRVL, AD/HRVL

Associate Director for EG, AD/EG

Budget Examiner(s), TCJ

Budget Examiner, HTP

Associate Director for NRES, AD/NRES

Budget Examiner(s), NRD

Budget Examiner, ESD

Operations Research Analyst(s), ESD

Deputy Associate Director for Energy and Science, ESD

Chief, Nuclear Energy Branch, ESD

Deputy Associate Director for NRES, NRES/SSD

Secretary, NRES/SSD

Associate Director for Management Administrator, OIRA

Management Analyst, OIRA

Attorney, OIRA

Deputy Administrator, OFPP

Secretary, AD/NSIA

Secretary to the Deputy Director, DO

Staff Asst. to the Executive Asst. to the Director, DO

Confidential Asst. to the Executive Asst. to the Director, DO

Special Assistant to the Director, DO Attorney Advisor, DO

Confidential Asst. to the Executive Associate Director, DO

Secretary to the Director(s), DO

Secretary(s), DO

Public Affairs Specialist(s), PA

Attorney(s), GC

Secretary(s), GC

Confidential Secretary to the General Counsel, GC

Chief, Correspondence Unit, ADM

Correspondence ClerkTypist, ADM

Legislative Assistant(s), LA

Special Assistant to the Director, LA

Admin. Asst. to the Assoc. Director for Legislative Affairs, LA

Secretary(s), LA

Secretary to the Associate Director for Economic Policy, EP

Economist(s), EP

Special Assistant, EP

Admin. Asst. to the Assoc. Director for HRVL, AD/HRVL

Secretary to the Associate Director for EG, AD/EG

Secretary to the Associate Director for NRES, AD/NRES

Secretary to the Associate Director for Management, AD/MGM

Staff Assistant to the Administrator, OIRA

Assistant Director for Administration, ADM

Budget and Management Officer, ADM

Support Services Specialist, ADM

Deputy Associate Director for Economic Po1icy, EP

Chief, Fiscal Analysis Branch, BRD

Deputy Chief, Fiscal Analysis Branch, BRD

Chief, Budget Preparation Branch, BRD

Deputy Assistant Director for Budget Review, BRD

Chief, Central Budget Management Branch, BRD

Chief, Manpower, Pay and Policy Branch, NSD

Deputy Associate Dir. for Health and Income Maintenance, HID

Chief, Veterans Affairs Branch, LVE

Chief, Education Branch, LVE

Deputy Assoc. Dir. for Labor, Veterans and Education, LVE

Chief, Treasury Branch, HTP

Chief, Housing Branch, HTP

Deputy Assoc. Dir. for Housing, Treasury and Postal, HTD

Chief, Transportation Branch, TCJ

Chief, Commerce Branch, TCJ

Deputy Assoc. Dir. for Transportation, Commerce & Justice, TCJ

Deputy Associate Director for Special Studies, EG/SSD

Deputy Associate Director for Special Studies, HRVL/SSD

Chief, Water Resources Branch, NRD

Chief, Agriculture Branch, NRD

Chief, Interior Branch, NRD

Chief, Environment Branch, NRD

Deputy Associate Director for Natural Resources, NRD

Chief, NonNuclear Energy Branch, ESD

Chief, Science and Space Programs Branch, ESD

Deputy Associate Director for Government Operations, MGM

Chief, Personnel and General Services Branch, MGM

Chief, Information Policy Branch, OIRA

Deputy Administrator, OIRA

Chief, Commerce and Lands Branch, OIRA

ClerkTypist, ADM

Secretary ADM

Secretary, LRD

Budget Methods Specialist, BRD

Secretary, BRD

Budget Examiner(s), IAD

Economist(s), IAD

Secretary(s), IAD

Budget Examiner(s), NSD

Secretary(s), NSD

Policy Analyst, NSIA/SSD

Economist(s), NSIA/SSD

Secretary, NSIA/SSD

Budget Examiner(s), TCJ

Budget Examiner(s), HTP

Economist, EG/SSD

Economist, NRD

Secretary(s), ESD

Budget Examiner, ESD

Program Analyst(s), ESD

Operations Research Analyst, ESD

Economist, NRES/SSD

Secretary, MGM

Budget Examiner, MGM

Senior Management Associate, MGM

Management Analyst, OIRA

Secretary, OIRA

Policy Analyst, OIRA

3. The following sensitive positions are identified as testing designated positions since they are involved with performing sensitive OMB policy functions requiring a high degree of trust and confidence.

Secretary to the Deputy Director, DO

Special Assistant to the Director, DO

Secretary(s), GC

Human Resources Manager, ADM

Human Resources Specialist, ADM

Chief, Economic Affairs Branch, IAD

Chief, Human Resources and Housing Branch, OIRA

Chief, Natural Resources Branch, OIRA

Chief, Statistics Policy Branch, OIRA

Chief, Information Technology Management Branch, OIRA

Associate Administrator for Management Controls, OFPP

Budget Examiner, AD/EG

Chief, Economics/Science/General Governnent Branch, LRD

Chief, Resources/Defense/International Branch, LRD

Chief, Labor/Welfare/Personnel Branch, LRD

Deputy Chief, Budget Preparation Branch, BRD

Chief, Health and Social Services Branch, HIMD

Chief, Income Maintenance Branch, HIMD

Chief, Health Financinq Branch, HIMD

Chief, Labor Branch, LVE

Deputy Associate Director for Financial Management, MGM

Chief, Financial Systems and Policy Ranch, MGM

Chief, Productivity Management Branch, MGM

Chief, Credit and Cash Management Branch, MGM

4.The following sensitive positions are identified as testing designated positions since they are regularly involved with the safe operation and maintenance of motor vehicles:

Motor Vehicle Operator(s)

C. Administrative Relief

If an employee of the Office of Management and Budget believes that his or her position has been wrongly designated as a testing designated position, the employee may submit an administrative appeal through his or her immediate supervisor and division/office head to the Director in accordance with the provisions of section VII D of the EOP Plan.

D. Decision Level for Deferral of Testing Because of Work Demands

The Director, and in his or her absence, the Deputy Director, may authorize deferral of testing for an employee whose immediately workdemands require uninterrupted continuation. Approved requests for deferral shall be documented in writing by the immediate supervisor as soon

as possible after a decision to defer is made. Such reports shall be sent to the Drug Program Coordinator for followup action to schedule the employee for unannounced testing within sixty days.

E. Decision Level for Reasonable Suspicion Testing

If an employee is suspected of using illegal drugs based on the conditions described in section X of the EOP Plan, the facts and circumstances of that case shall be presented to the secondlevel supervisor of the suspected employee who shall decide, after consultation with the Assistant Director for Administration and General Counsel, whether to proceed with testing.

F. Applicant Testing

Preappointment drug testing of applicants tentatively selected for a testing designated position in the Office of Management and Budget is required pursuant to and in accord with section XI of the EOP Plan.

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-837

# In the Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR W. STIGILE AND ELLEN BALIS, PETITIONERS

*v.*

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
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19 pp

## QUESTION PRESENTED

Whether random drug testing of employees who hold permanent passes allowing them special access to the Old Executive Office Building, which is within the security perimeter of the White House, is reasonable under the Fourth Amendment.

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# In the Supreme Court of the United States

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 110 F.3d 801. The opinion of the district court (Pet. App. A20-A26) is reported at 932 F. Supp. 365.

### JURISDICTION

The judgment of the court of appeals was entered on April 15, 1997. (Pet. App. A32.) The petition for rehearing was denied on August 21, 1997. The petition for a writ of certiorari was filed on November 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Old Executive Office Building (OEOB) is located inside the White House security perimeter, which is marked by a contiguous fence and is closed off to the public. The only other building located within the security perimeter is the Executive Mansion, which includes the East and West Wings of the White House. The grounds of the OEOB are a few yards away from the West Wing, and there is no physical barrier between the two buildings. C.A. J.A. 4.[1] The OEOB offers close, direct vantage points from which to observe the West Wing, the Executive Mansion, and the President's and Vice President's common routes of travel. The Vice President has an office in the OEOB, and the President and Vice President frequently visit the building for meetings and other purposes. Pet. App. A3.

Access to the OEOB is tightly restricted. Individuals who do not hold permanent OEOB or White House passes may enter the building only if they are invited by a White House or OEOB passholder, and only after they are cleared for entry by the WAVES (Worker and Visitor Entrance System) Center. See Pet. App. A3. Non-passholder visitors must also present photo identification to a Secret Service officer at the OEOB entrance and wait for the officer to verify their clearance. By contrast, White House and OEOB passholders may enter the OEOB without an invitation, are not processed through the WAVES Center, and are not required either to present a photo identification or to wait for the Secret Service to verify

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[1] "C.A. J.A." refers to the joint appendix filed under seal in the court of appeals. "C.A. Pub. J.A." refers to the separate, publicly filed joint appendix.

their clearance. Those special privileges allow White House and OEOB passholders to enter the building for meetings without having to wait in line at the entrance. See C.A. J.A. 17, 58.

2. Executive Order 12,564 directs the head of each executive agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions." 51 Fed. Reg. 32,889, 32,890 (1986). Pursuant to that Executive Order, the Executive Office of the President (EOP) issued its Drug-Free Workplace Plan in July 1988, and amended the plan in 1992. The EOP plan mandates, *inter alia*, random testing of employees who hold sensitive positions. See C.A. Pub. J.A. 62.

After several serious security incidents at the White House complex in 1994, see C.A. J.A. 3, the Office of Management and Budget (OMB)—an agency within the EOP—took a fresh look at its drug testing program and, after careful deliberation, decided to issue 30-day random testing notices to all its OEOB passholders. Gov't C.A. Br. 14-15.[2] A drug-using OEOB passholder is in a unique position to harm the President or Vice President. First, OEOB passholders could themselves harm the President or Vice President inside the White House security perimeter: the President and Vice President visit the OEOB frequently, and security procedures cannot prevent an OEOB passholder from coming within a few feet of the President or Vice President on such a visit. See

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[2] A 30-day notice informs an employee that he will become subject to the possibility of random testing in 30 days. OMB had identified all its OEOB passholders as subject to random drug testing in 1992, but, until 1995, it had issued 30-day notices only to employees hired after 1992. See Pet. App. A4.

C.A. J.A. 2-4, 6. Second, an OEOB passholder could clear into the building a visitor who wishes to harm the President or Vice President. Pet. App. A4.[3] Finally, OEOB passholders could "collect information on the comings and goings of either official for some third party intent on rendering such harm." *Ibid.* Unlike anyone else, OEOB (and White House) passholders have unlimited access to the OEOB 24 hours per day, 365 days per year. They therefore have unique opportunities to collect sensitive information about the President's and Vice President's movements and common routes of travel inside the White House security perimeter. See Pet. App. A3-A4.

3. Petitioners are OMB economists who are subject to the agency's random drug testing program. Their offices are in the New Executive Office Building (NEOB), which is located across Pennsylvania Avenue from the OEOB and lies outside the White House security perimeter. They and other OMB staff in the NEOB have been issued OEOB passes because their jobs require them to visit the OEOB for meetings and other official functions. See Pet. App. A4; see also Pet. 3. Petitioners filed this action in June 1996, obtained a temporary restraining order prohibiting the government from testing them, and moved for a preliminary injunction continuing the TRO. The district court consolidated the preliminary injunction motion with its consideration of the merits. After an evidentiary hearing, at which government security officers provided testimony about the basis for the drug testing program, the court

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[3] Only White House and OEOB passholders have authority to clear visitors into the OEOB. White House passholders are also subject to random drug testing.

granted a permanent injunction barring random testing of both plaintiffs. See Pet. App. A20-A26.

4. The court of appeals reversed. Pet. App. A1-A19. It first observed that urinalysis drug testing is a Fourth Amendment search, and that a court must evaluate the reasonableness of a drug testing program by balancing the need for the program against any reasonable privacy expectations the tested employees may have. Pet. App. A5. Applying that test, the court concluded that the government's purpose in testing OEOB passholders—to protect the President and Vice President in their primary work environment—is of "the utmost importance," *id.* at A6, and that the harm the government seeks to avoid— physical harm to either of those officials—"has the necessary immediate connection to the risk posed by a drug-using employee," *id.* at A10. The court emphasized that OEOB passholders have special access to the OEOB, and that they therefore present greater potential risks to the President's and Vice President's safety than do other visitors to the OEOB, whose access is more limited. *Id.* at A11-A12.

In a separate concurring opinion, Judge Rogers agreed that, "[g]iven the unique access to areas within the White House security perimeter that an [OEOB] pass provides, the court could scarcely avoid concluding that the drug testing program of the [EOP] is reasonably related to the goal of preventing harm to the President and Vice President." Pet. App. A13. She wrote separately to emphasize that the court of appeals' decision was limited by "(1) the need to enable the President and Vice President to do their jobs; (2) the access needs of and consequences for OMB passholders; and (3) the nature of the drug testing program," *id.* at A15, which is "conducted in a

manner that minimizes intrusion into individual privacy," *id.* at A18.

Petitioners filed a petition for rehearing with a suggestion of rehearing in banc, arguing, among other things, that the panel decision conflicts with *Chandler* v. *Miller*, 117 S. Ct. 1295 (1997), which was issued on the same day as that decision. After the court of appeals directed the government to file a response, the panel denied the petition for rehearing, and, with Judge Wald dissenting, the full court denied the suggestion of rehearing in banc. See Pet. App. A28-A30.

## DISCUSSION

The court of appeals' opinion is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioners principally argue that the decision below is inconsistent with *Chandler* v. *Miller*, 117 S. Ct. 1295 (1997). See Pet. 13-18, 22-24. We disagree. In *Chandler*, this Court struck down a Georgia statute that required candidates for election to state office to certify that they had taken a drug test and that the result of that test was negative. 117 S. Ct. at 1298. The Court held that the statute violated the Fourth Amendment because it "diminishe[d] personal privacy for a symbol's sake" (*id.* at 1305)—*i.e.*, to protect the State's "image" by demonstrating its generalized resolve to combat drug abuse (*id.* at 1304) —and not to address any actual "concrete danger" (*id.* at 1303). The Court emphasized, however, that, "where the risk to public safety *is* substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches

now routine at airports and at entrances to courts and other official buildings." *Id.* at 1305 (emphasis added); see also *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union (NTEU)* v. *Von Raab*, 489 U.S. 656 (1989); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646 (1995).

Unlike *Chandler*, this case does involve a "substantial and real" threat to safety: the safety of the President and the Vice President. As the court of appeals concluded (Pet. App. A4, A10-A12), federal employees who hold permanent passes to the OEOB are uniquely well-positioned to threaten the President and Vice President and to give others the information or entry clearance they may need to jeopardize the lives of those officials. The record amply justifies that conclusion. First, the President and Vice President visit the OEOB frequently, and OEOB passholders themselves commonly come within a few feet of the President and Vice President on those visits. See C.A. J.A. 2-4, 6. Second, OEOB passholders can clear into the OEOB visitors who may be intent on harming the President or Vice President. Although the Secret Service checks to ensure that a visitor's name does not show up on a National Crime Information Center database, see C.A. J.A. 6, 56, there is no other review of the identity and background of visitors cleared into the building by an OEOB passholder, and, except for foreigners, visitors need not be escorted once they are inside. Finally, passholders have continual access to the OEOB, and they have unique access to vantage points from which to learn the President's and Vice President's common routes of travel inside the White

House security perimeter. See Pet. App. A3-A4; C.A. J.A. 6-7.

Those facts confirm that, in *Chandler*'s terms, the drug testing at issue here responds to "substantial and real" threats, 117 S. Ct. at 1305, not merely "symbolic" aspirations.[4] Petitioners are therefore simply incorrect in claiming (*e.g.*, Pet. 13) that there are no "special risks" of harm in this case. To the contrary, this case involves exceptionally important concerns about threats to the safety of the President and Vice President, and it therefore falls squarely within the class of cases in which the courts have consistently upheld reasonable programs of random drug testing. See, *e.g.*, *NTEU* v. *Von Raab*, *supra* (approving suspicionless drug testing of applicants for Customs Service positions because of, *inter alia*, concerns about how drug use could affect employees' use of firearms); *American Federation of Government Employees (AFGE)* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (approving random drug testing of hazardous material inspectors and aircraft mechanics), cert. denied, 495 U.S. 923 (1990); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (approving random drug testing of nuclear power plant employees).

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[4] Petitioners challenge what they allege to be an "alternative holding" by the court of appeals that "this testing was constitutional because of the government's interest in 'assuring the public that it is taking every possible precaution' to protect the President." Pet. 16-17 (quoting Pet. App. A6). The court of appeals, however, made no such "alternative holding." To the contrary, it mentioned the interest in question only to clarify that it was "not asserted in this case," and to avoid "creat[ing] an inadvertent precedent by negative implication." Pet. App. A6.

2. Despite petitioners' apparent contention to the contrary (*e.g.*, Pet. 14), agencies charged with protecting the President and Vice President are "permitted, within reason, to anticipate novel security threats and to act to avert them." *White House Vigil for the ERA Comm.* v. *Clark*, 746 F.2d 1518, 1534 n.107 (D.C. Cir. 1984). "No President was ever killed in a theatre until Lincoln, in a railway station until Garfield, in a reception line until McKinley, or in an open car until Kennedy." *Ibid.* (internal quotation marks omitted). The government is entitled to address such threats before they materialize into actual assassination attempts.

Petitioners further contend (Pet. 14-16), however, that random drug testing of OEOB passholders is unnecessary because, they say, the President and Vice President are adequately protected by the Secret Service and by other existing security measures in the White House complex. But the Constitution does not require the federal courts to fine-tune the proper level of physical protection for the President and Vice President. Instead, as applicable precedent makes clear, the physical safety of those officials is a matter committed to the broad discretion of White House security officials. See *White House Vigil*, 746 F.2d at 1534 (although security measures for sidewalk in front of White House were not the only means available, "[w]e are not at liberty * * * to replace the agency's judgment with our own"); *Sherrill* v. *Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (courts should be "appropriately deferential" to government determinations regarding "what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family").

The drug testing program at issue here is a permissible exercise of that discretion. As discussed above, see pp. 3-4, *supra*, other security measures cannot prevent an OEOB passholder (or someone admitted by that passholder into the OEOB) from coming within a few feet of the President and Vice President inside the White House security perimeter, and no security detail can fully insulate the President or Vice President from physical threats under those conditions. Indeed, Presidents Reagan, Ford, and McKinley were each guarded by Secret Service details when they were fired upon. See, *e.g.*, *United States* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); C.A. Pub. J.A. 353. Moreover, OEOB passholders have continual access to locations from which they can observe the President's and Vice President's principal routes of travel within the White House security perimeter, see pp. 2, 4, *supra*, and existing security measures could not prevent a drug-using OEOB passholder from conveying that information to someone who wishes to harm those individuals.

3. Petitioners separately suggest that the government is unjustified in its concern that an OEOB passholder's use of illegal drugs would increase the risk of harm to the President and Vice President. See, *e.g.*, Pet. 16-17. That argument is without merit. Even apart from the danger that mind-altering drugs could induce a passholder himself to take actions that would jeopardize the safety of those officials, a federal employee's use of such drugs also raises a substantial danger of bribery or blackmail. See Pet. App. A11, A13; see also *Von Raab*, 489 U.S. at 669, 674; *Hartness* v. *Bush*, 919 F.2d 170, 172-173 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991); *NTEU* v. *United States Customs Service*, 27 F.3d 623, 624 (D.C. Cir. 1994);

*AFGE Local 1533* v. *Cheney*, 944 F.2d 503, 506 & n.6 (9th Cir. 1991). Although petitioners seek to belittle that concern (see Pet. 17-18), this Court has itself recognized the danger inherent in a drug user's unusual susceptibility to bribery and blackmail. See *Von Raab*, 489 U.S. at 669, 674. Moreover, the Fourth Amendment does not require security officials to wait for the first instance of drug-related bribery or blackmail to occur in this context before they act to prevent the possibility of a drug-related attack on the President or the Vice President. That is why, in *Von Raab*, this Court upheld the constitutionality of suspicionless drug testing of certain Customs Service employees even though the Service's drug testing program "was not implemented in response to any perceived drug problem among Customs employees." *Id.* at 673; see *id.* at 674-675.[5]

4. Petitioners also claim (Pet. 18-21) that the drug testing program at issue here violates the Fourth Amendment because, they contend, there is no "nexus" between the program and a tested employee's job responsibilities. That argument is without merit as well. The Fourth Amendment permits reasonable drug testing of persons whose official employment provides them with special opportunities to do harm to national security or individual safety; that principle is not arbitrarily limited to employees who could cause such harm only within the narrow ambit of

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[5] The Court added that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of illegal drug use. 489 U.S. at 674 (citation omitted). Here, the EOP drug testing program has produced at least six positive results since its inception, see Stigile C.A. Br. 4 n.1, and it may well have deterred other employees from using drugs for fear of detection.

their job descriptions. Thus, in determining the class of employees who may constitutionally be subjected to random drug testing, this Court and other courts have considered not just the specific tasks those employees perform, but also other considerations, such as the access a job provides to sensitive information. See *Von Raab*, 489 U.S. at 677 (compelling interest in protecting truly sensitive information would justify suspicionless drug testing of employees whose jobs give them access to such information); *Hartness* v. *Bush*, 919 F.2d at 171; *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (same), cert. denied, 493 U.S. 1056 (1990). As the court of appeals recognized, the same principle applies where, as here, an employee's job gives him or her access to locations that are highly sensitive for safety-related reasons. See Pet. App. A8-A11; *id.* at A17 (Rogers, J., concurring).[6]

There is likewise no merit to petitioners' contention that the court of appeals' ruling would allow suspicionless drug testing of virtually all federal employees on the theory that almost any federal employee "might at some time be in the vicinity of

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[6] Petitioners suggest that they do not need OEOB passes to do their jobs and that they were issued such passes only to serve "administrative convenience." Pet. 4. That is not so. As the court of appeals noted, "[m]any of the OMB's senior staff have offices in the OEOB," and OMB employees such as petitioners are issued OEOB passes "because of their frequent need to visit the building for meetings with their supervisors." Pet. App. A3. Petitioners' passes allow them to enter the building without having to undergo various time-consuming procedures that apply to visitors who do not hold OEOB or White House passes. See pp. 2-3, *supra*. That ability to enter the OEOB quickly is thus an important job-related requirement. See Gov't C.A. Br. 7; Pet. App. A4, A17.

* * * [the President or Vice President]." Pet. 22. OMB designated its OEOB pass holders for random testing because their jobs require them to have *special* access to the White House security perimeter, within which the President and Vice President need to move about freely to conduct the affairs of state. Federal employees whose jobs do not require that kind of special access are not covered by the court of appeals' decision. See Pet. App. A3-A4, A11-A12; *id.* at A16-A19 (Rogers, J., concurring); see also *Harmon*, 878 F.2d at 490 (holding that Fourth Amendment prohibits random testing of all federal employees).

Petitioners are also mistaken in contending (see Pet. 20-21) that this drug testing program is unconstitutionally *under*inclusive because the government does not require random drug testing of (for example) volunteers or short-term interns. Because permanent OEOB passholders have special authorization to invite vistors inside the White House security perimeter, and because they have long-term access to areas where the President and Vice President work, they pose a greater potential risk to the safety of those officials. See Pet. App. A12 (majority opinion); Pet. App. A16-A17 (Rogers, J., concurring); see generally pp. 2-3, *supra* (discussing special privileges of permanent passholders). That the White House has narrowly tailored its random testing program to include only those employees who have special access to the OEOB does not somehow undermine the constitutionality of that program; instead, it confirms the program's reasonableness.

5. Finally, petitioners contend that the court of appeals failed to balance the government's compelling interest in ensuring the safety of the President and

Vice President against the passholders' reasonable expectations of privacy. Pet. 23-24. That is incorrect. The court of appeals recognized and correctly applied the Fourth Amendment balancing test that governs employee drug testing programs. See Pet. App. A7; see also Pet. App. 18 (Rogers, J., concurring). The court held that, in this particular setting, the government's exceptional interest in protecting the President and Vice President from assassination justifies a drug testing program covering employees who have unusual access to the areas in which the President and Vice President work. See Pet. App. A11. That holding is sound, and it does not conflict with the decisions of this Court or any other court.

Moreover, the court of appeals identified a number of factors that substantially mitigate any privacy-related concerns petitioners may have. The court observed, for example, that the federal regulations governing the EOP's testing program "minimize the [program's] intrusion" on petitioners' reasonable privacy interests, and that petitioners' expectation of privacy "is lessened because they occupy positions that require stringent background checks." Pet. App. A7. Likewise, "[u]nder mandatory guidelines, EOP employees who are selected for random drug testing are permitted to provide urine samples in a rest room stall or similar enclosure," and "[a]lthough a monitor of the same gender may be present, the monitor is not permitted to observe the employee producing the sample unless there is reason to believe the employee will alter or substitute the urine specimen." Pet. App. A18 (Rogers, J., concurring). Those considerations, which were also present in *Von Raab* and *Skinner*, substantially "minimize the intrusiveness

of the . . . drug-screening program." *Ibid.* (quoting *Von Raab*, 489 U.S. at 672 n.2).[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In two footnotes, petitioners suggest that further review is necessary because the district court "consolidat[ed] their motion for preliminary injunction with the merits" and thereby allegedly deprived them of an opportunity for full discovery. Pet. 7 n.1; see also Pet. 27 n.8. This Court does not typically grant certiorari to review that kind of discovery dispute, however, and petitioners have failed to make any specific showing that a remand to the district court would produce additional facts relevant to this case. See *Bastin* v. *Federal Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (no right to additional discovery where party seeking discovery offers nothing but "rank speculation" to support requests). In any event, petitioners did not adequately present that argument to the panel. In their brief on the merits, they relegated the issue to a single footnote, in which they claimed only that the court of appeals should remand "to the extent this Court determines that additional facts are necessary in order to affirm the District Court's decision." Stigile C.A. Br. 12-13 n.6. The footnote did not identify any "additional facts" that discovery might reveal.